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No. 77-820

In The Supreme Court of The United States

_____ Term, 1977

ALEXANDER BENJAMIN CHASES

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ALEXANDER BENJAMIN CHASES,

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v.

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner, Alexander Benjamin Chases, respectfully prays that a writ of ceriorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case June 24, 1977, amended August 10, 1977, rehearing denied November 7, 1977.

OPINION BELOW

The opinion of the Court of Appeals of August 10, 1977, is not reported at this date, but is set forth verbatim in Appendix "A" at pages 15 through 20. The Petition for Rehearing and Suggestion for Rehearing in Banc was denied by order, without opinion.

JURISDICTION

On June 24, 1977, the Court of Appeals for the Ninth Circuit entered judgment affirming the criminal conviction of Petitioner for possession of marijuana with intent to distribute in violation of 21 U.S.C. Section 841(a)(1), amended August 10, 1977, rehearing denied November 7, 1977. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1), and Rule 22(2), Rules of the Supreme Court.

QUESTION PRESENTED

Did the Government's prosecution by multiple indictments, charging petitioner with involvement in separate conspiracies although the facts indicated only a single conspiratorial operation existed, violate petitioner's rights to be free from double jeopardy and to receive due process of law, under the Fifth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be

> twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

Petitioner and other defendants were allegedly engaged in a complex operation which involved smuggling marijuana across the Mexican border by plane for distribution in the United States. Between October 1975 and March 1976 the Federal Grand Jury sitting in San Diego, California, returned ten similar indictments naming approximately forty individuals and charging conspiracies to import, to possess with intent to distribute, and to distribute quantities of marijuana [58]. [All page references herein are to the Clerk's Transcript on Appeal.] Petitioner was named in four of these indictments, which charged allegedly distinct conspiracies during the period from September 1, 1974, to October 19, 1975 [58].

The first of these four indictments, No. 751831 returned October 29, 1975,[1/]

1/ No. 76-2981 on appeal to the United States Court of Appeals for the Ninth Circuit, and the subject of a companion Petition for Writ of Certiorari now pending before this Court.

charged a conspiracy to import and possess marijuana, in violation of 21 U.S.C. Sections 841, 846, 952, 960, and 963, from September 13, 1975, to October 19, 1975 [58]. Petitioner was named with co-defendants Edwin C. Oakes, Randolph C. Perkey, and Charles H. Chappell [58]. The indictment listed seven overt acts, reflecting an alleged plan to fly 360 kilos of marijuana to an airstrip known as "The Cross" [58]. Petitioner was named in two of the seven overt acts [58].

The remaining three indictments naming Petitioner were returned March 18, 1976. Two of these indictments, Nos. 76-0263 and 76-0269, alleged conspiracy to import, possess, and distribute marijuana (21 U.S.C. Sections 841, 846, 952, 960, and 963) [58-59]. In case no. 76-0263 Petitioner was charged with Oakes, Antonio Martinez, Raymond Gene Fritz, Bobbie Lee Rowland, Ken Baker, and eight others [58]. Petitioner was named in three of the 66 overt acts. Id. The conspiracy was alleged to have continued from February 25, 1975, until July 31, 1975, and the overt acts reflected alleged smuggling activity in which 300 kilos of marijuana were flown to an airstrip near Brawley, California, known as "The Tower" [58-59].

In case No. 76-0269 Petitioner was charged with Martinez, Fritz, Rowland, Baker, and nine others, and was named as a participant in two of 129 overt acts [59]. This conspiracy allegedly lasted from September 1, 1974, to February 7, 1975, and consisted of smuggling, on five occasions, approximately 300-kilo loads of marijuana to "The Tower" airstrip

near Brawley [59]. The overt acts also reflected two deliveries of approximately 300-kilo loads of marijuana to "The Cross" airstrip near Blythe, California [59]. Loads of 1,000 kilos were also allegedly flown to "The Tower" on four occasions, as well as to two other airstrips [59].

The fourth indictment (No. 76-0270; No. 76-2902 on appeal and the subject of this Petition) was returned in two counts [1-8]. The first count alleged a conspiracy from July 1, 1975, to September 12, 1975, in which Petitioner was charged with conspiracy to import and possess marijuana in violation of 21 U.S.C. Sections 841, 846, 952, 960, and 963. Also charged in Count One were Martinez, Fritz, Oakes, Perkey, and Chappell; Petitioner was named in six of 22 overt acts describing importation of 369 kilos of marijuana flown to "The Tower" airstrip [1-8]. Count Two charged that on September 12, 1975, Petitioner, Perkey, and Chappell, aided and abetted by Fritz, possessed marijuana with intent to distribute (21 U.S.C. Section 841(a)(1)) [8].

On May 27, 1976, Petitioner moved to dismiss the indictment, in the instant case, on the grounds that dividing a single comprehensive conspiracy into multiple conspiracies for trial, through the issuance of separate indictments, violated the Fifth Amendment's prohibition against double jeopardy and guarantee of due process [64]. Petitioner's motion was denied on June 7, 1976 [117].

On June 22, 1976, petitioner was convicted of the conspiracy charged in Case No. 75-1831 (submitted on stipulated facts), and was thereafter sentenced to

five years' imprisonment and a five-year special parole term [113].

On June 29, 1976, Petitioner again waived his right to trial by jury and the instant case was submitted on stipulated facts. Petitioner was found guilty of the substantive offense charged in Count Two, and received a sentence of five years' imprisonment and a five-year special parole term, to run concurrently with the sentence imposed in Case No. 75-1831 [117]. Thereafter, the charges in Case No. 76-0263, Case No. 76-0269, and Count One of the indictment in the instant case were dismissed on the Government's motion [117].

Petitioner filed notice of appeal in both Case No. 75-1831 and the instant case on August 20, 1976 [114]. The Court of Appeals affirmed both convictions, and denied petitions for rehearing on November 7, 1977.

REASON FOR GRANTING THE WRIT

The Writ should issue to resolve Petitioner's claim that the filing of multiple indictments alleging separate conspiracies in the face of evidence demonstrating only a single conspiracy, resulted in Petitioner being placed twice in jeopardy for the same offense. Moreoever, Petitioner further contends that due process' guarantee of fairness is offended when the government's charging powers are abused in the attempt to overwhelm an accused by successive prosecutions in the manner demonstrated by the instant case.

The task of defining the scope of a conspiracy "is somewhat akin to describing an elephant from touch." United States v. Mallah, 503 F.2d 971, 987 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975). However, the governing constitutional principle is that a single continuing conspiracy, no matter how diverse its objects, cannot be broken down into multiple prosecutions. Braverman v. United States, 317 U.S. 49, 53 (1942). Where facts indicate that a single, albeit large, conspiracy exists, but the government does not possess sufficient evidence to indict all suspected conspirators under a single indictment, the government should not be permitted, consistent with the aforementioned principle, to fragment its prosecution so as to try various offenders in artificially compartmentalized lots, thereby avoiding the risks of a single prosecution. United States v. Tanner, 471 F.2d 128, 142 (4th Cir. 1972), cert. denied, 409 U.S. 949 (1972). Quite simply, the government may not prosecute for several conspiracies when, in truth, there was only one. United States v. Kissel, 218 U.S. 601, 607 (1910); United States v. Moore, 522 F.2d 1068, 1078 (9th Cir. 1975), cert. denied, 423 U.S. 1049 (1976); United States v. Young, 503 F.2d 1072, 1075 (3d Cir. 1974); United States v. Cohen, 197 F.2d 26, 29 (3d Cir. 1952). To convict an accused severally for being part of two conspiracies, when in reality he was only involved in one overall conspiracy, would be convicting him of the same crime twice. United States v. Palermo, 410 F.2d 468, 470 (7th Cir. 1969).

Agreement is the primary element of a conspiracy. Braverman v. United States, supra, 317 U.S. 49; United States v. Varelli, 407 F.2d 735, 741 (7th Cir. 1969). If there was but one agreement between the Petitioner and his co-defendants there can be but one conspiracy charge laid against them. This is true whether the conspiracy had one objective, a set of objectives, or an overall objective to be achieved by multiple actions. United States v. Perez, 489 F.2d 51, 62 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1973).

In both the instant case, and Cases No. 76-0263 and 76-0269, deliveries of approximately 300-kilo loads of marijuana were allegedly made to "The Tower" airstrip. The marijuana in each of those cases was allegedly purchased from defendant Martinez. Martinez was not indicted in Case No. 75-1831, and the airstrip alleged to have been used there was known as "The Cross." However, in both the instant case, and Case No. 75-1831, the marijuana was (No. 76-0270), or would have been (No. 75-1831), brought in from the same location in Mexico (an "airstrip called Caborca #3 near Hermosillo" [4, 78]). The destination of the contraband in No. 75-1831 ("The Cross" airstrip) was also allegedly used in Case No. 76-0269. The quantity of marijuana in Case No. 75-1831 (360 kilos) was almost identical to that in the instant case (369 kilos). In addition, there was evidence in Case No. 75-1831 that defendant Oakes had told undercover Agent Farnan that it was "their goal to make two or three trips per week until all concerned had made $100,000 tax-free" [78]. Given that goal, it is just as

logical to assume that defendants had been in pursuit of it since September 1, 1974, as it is to propose that suddenly, on September 13, 1975, they decided to set a new goal and embark upon a separate and distinct criminal enterprise.

Analysis of the facts (i.e., the scope of the conspiracy(s) charged) alleged in each of the four cases leads to the conclusion that if conspiracy existed it was but a single conspiracy. It is of little significance that the evidence to be adduced at each trial would be different. The efficacy of the "same evidence test," used to determine questions of double jeopardy, is open to question in narcotics conspiracy cases. United States v. Papa, 533 F.2d 815, 820 (2d Cir. 1976). Due to the government's power to select the overt acts charged in each indictment, prosecutorial discretion may result in a single conspiracy's being capable of proof in several prosecutions requiring different evidence for conviction. United States v. Papa, supra, 533 F.2d at 820; see United States v. Mallah, supra, 503 F.2d at 985. This is precisely the reason for the rule that the government is not free to arbitrarily decide whether there is one agreement or several. If there is but one conspiracy it must be charged as such.

In order to conceptualize and link up the various facets of large-scale conspiraices, courts have resorted to various structural analogies. For example, in a "chain conspiracy" the government is not required to show that individuals at one level had dealings beyond those at the next. Sufficient proof of a single conspiracy is established where the

success of certain defendants' independent ventures is shown to have been dependent upon the success of the entire "chain". United States v. Miley, 513 F.2d 1191, 1206 (2d Cir. 1975). Likewise, in a "wheel conspiracy," although it is necessary to provide a "rim" binding the entire scheme into a unified operation so as to refute the appearance of separate and distinct "spoke conspiracies," in order to "rim the wheel" the government is not required to prove direct contact and connivance between all of the parties. See United States v. Baxter, 492 F.2d 150 (9th Cir. 1973). In many cases the aforestated analogies serve to bring into focus the true nature of a conspiratrial endevor. In others, measurement of the character and scope of the conspiracy is impaired by efforts to mold the conspiracy into any one of "today's galaxy of mechanical, molecular or atomic forms." United States v. Perez, supra, 489 F.2d at 59 n.11.

Whatever method is chosen to decipher the conduct involved, the central question remains, "[I]s there a common continuing objective of the parties, is there a single offense despite the existence of diverse ways and means used to accomplish it?" Braverman v. United States, supra, 317 U.S. at 52.

If an agreement contemplates a continuing scheme of activity, that is dependant upon continuous cooperation among the conspirators, then "it is a perversion of natural thought and of natural language" to call it a series of distinct conspiracies rather than a single conspiracy. United States v.

Kissel, supra, 218 U.S. at 607; United States v. Perez, supra, 489 F.2d at 62; United States v. Palermo, supra, 410 F.2d at 470.

In order to secure the outcome of its prosecution of Petitioner, the Government sliced a single venture unified by a consistent objective, both vertically and horizontally, into disparate segments. A series of events (i.e., as shown by the overt acts alleged in the various indictments) extending from September 1, 1974, to October 19, 1975, was subdivided into four time periods in an effort to establish four separate and distinct conspiraices. Petitioner objected to this subdivision, contrary to the opinion expressed by the Court of Appeals (see Appendix "A" at 19), in the Motion to Dismiss denied by the District Court on June 7, 1976. Thereafter, Petitioner was faced with the task of defending against charges which represented mere fragments of the complex operation investigated by the Grand Jury, and proceeded to trial in the instant case after he had already been convicted in Case No. 75-1831 on charges representing another fragment of the same overall operation.

Additionally, the government's subdivision of the smuggling operation into separate conspiracies not only placed Petitioner severally in jeopardy for the same offense, but constituted a violation of his constitutional right to due process of law. A series of prosecutions may be recognized as fundamentally unfair if the state is simply "attempting to wear down the accused by a multitude of cases with accumulated trials." Palko v. Connecticut, 302 U.S. 318, 328 (1937).

This Court, in Petite v. United States, 361 U.S. 529 (1970), was advised by federal prosecutors that it was the policy of the federal government

> "[t]hat several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations of both fairness to defendants and of efficient and orderly law enforcement."

When this policy is disregarded, and where, as here, the government is allowed the advantage (analogous to forum-shopping) gained by slicing up indictments and meting out the pieces to different judges, the danger arises that a conviction will be secured simply through confusion of the issues and the consumption of an accused's energies and resources by multiple trials.

Petitioner has been convicted of only one conspiracy charge and one substantive offense; all other charges have been dismissed with prejudice. However, the Court of Appeals' judgment that the subsequent dismissals "effectively eliminated any danger or risk of successive prosecution for the same crime" (see Appendix "A" at 18), misses the point. Although Petitioner was not convicted of more than one conspiracy "fragment" he was nevertheless tried or threatened with trial for more than one. Faced with four successive prosecutions, Petitioner realized that any possible benefit resulting from initial acquittal(s)

would be overbalanced by a single later conviction and the sanctions imposed therein. In this light, Petitioner's stipulated fact trials appear as nothing more than slow pleas of guilty. In Green v. United States, 335 U.S. 184, (1957) this Court observed:

> "[T]hat the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Green v. United States, 355 U.S. 184 (1957).

The aforestated considerations demonstrate that Petitioner's Fifth Amendment rights, to be free from double jeopardy, and to receive a fair trial as mandated by due process, were denied to him by the Government's abuse of its charging power.

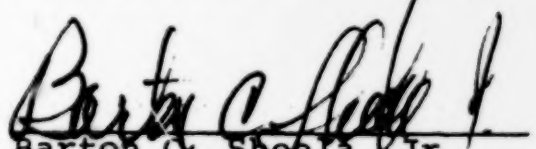
CONCLUSION

For the foregoing reasons, Petitioner Alexander Benjamin Chases respectfully prays that a writ of certiorari

issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Dated: December 1, 1977

Respectfully submitted,



Barton C. Sheela, Jr.

Victoria Sleeth,
Certified Legal Intern

APPENDIX "A"

Amended August 10, 1977

UNITED STATES of America,
Plaintiff-Appellee,

v.

Alexander Benjamin CHASES,
Defendant-Appellant.

No. 76-2902.

United States Court of Appeals,
Ninth Circuit.

June 24, 1977.

Defendant was convicted before the United States District Court for the Southern District of California, Gordon Thompson, Jr., J., of possession of marijuana with intent to distribute, and he appealed. The Court of Appeals held that: (1) although defendant had been named in four separate indictments, he was not placed in double jeopardy on theory that indictments each arose out of same episode or transaction; (2) government efforts to prosecute defendant for related offenses in successive trials was not fundamentally unfair amounting to impermissible "harassment" violative of due process; and (3) defendant's claim that filing of a series of indictments allegedly arising out of same episode or transaction violated his speedy trial rights was groundless.

Affirmed.

1. CRIMINAL LAW 200(6)
Although defendant had been named in four separate indictments, he was not placed in double jeopardy on theory that indictments each arose out of same episode or transaction, since defendant had been prosecuted for and convicted of only two crimes, that is, conspiracy to import and possess marijuana with intent to distribute and possession of marijuana with intent to distribute, and all other charges and indictments had been dismissed with prejudice. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1); U.S.C.A.Const.Amends. 5, 6.

2. CRIMINAL LAW 200(6)
Conspiracy and possession of marijuana convictions implicated no double jeopardy principles, since conspiracy to commit an illegal act, that is, the substantive offense, are separate and distinct offenses. Comprehensive Drug Abuse Prevention and Control Act of 1970, §401(a)(1), 21 U.S.C.A. § 841(a)(1); U.S.C.A.Const.Amends. 5, 6.

3. CONSTITUTIONAL LAW 257
Government efforts to prosecute defendant for related offenses in successive trials was not fundamentally unfair amounting to impermissible "harassment" violative of due process, since government could reasonably conclude at indicting stage that separate and distinct conspiracies existed thus vitiating any claim of bad faith multiplicity or harassment and defendant never moved to consolidate the four separate cases against him and, after his conviction on one conspiracy charge, he failed to move for dismissal of remaining

conspiracy charges on double jeopardy grounds. U.S.C.A. Const. Amends. 4, 5.

4. CRIMINAL LAW 573
Defendant's claim that filing of a series of indictments allegedly each arising out of same episode or transaction violated his speedy trial rights was groundless, where trial came 100 days after arraignment and thus delay, if any, was negligible, defendant never sought an earlier trial and defendant did not even seriously allege, let alone establish, any prejudice caused by the timing of his trial. U.S.C.A.Const. Amend. 6.

Appeal from the United States District Court for the Southern District of California.

Before CLARK, Justice,* and TRASK and WALLACE, Circuit Judges.

PER CURIAM:

Chases was convicted after a court trial on stipulated facts of possession of marijuana with intent to distribute in violation of 21 U.S.C. §841(a)(1). On appeal, he contends that the filing of a series of indictments, "each arising out of the same episode or transaction,"

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* Associate Justice Tom C. Clark, United States Supreme Court (Ret.), sitting by designation. Justice Clark concurred in the result after oral argument but did not vote on the disposition due to his untimely death.

violated the double jeopardy, due process and speedy trial clauses of the Fifth and Sixth Amendments. We affirm.

[1,2] The double jeopardy argument is without merit. Although named in four separate indictments, Chases was prosecuted for and convicted of only two crimes: conspiracy to import and possess marijuana with intent to distribute (affirmed today in the companion case of United States v. Chases, ___ F.2d ___), and possession of marijuana with intent to distribute (the conviction challenged on this appeal). On the government's post-convictions motion, all other charges and indictments--including the conspiracy count in the two count indictment giving rise to the confiction challenged here were dismissed with prejudice. The conspiracy and possession convictions clearly implicate no double jeopardy principles. Conspiracy to commit an illegal act and the commission of that act--the substantive offense--are separate and distinct offenses. E.g., Callanan v. United States, 364 U.S. 587, 81 S.Ct. 321, 5 L.Ed.2d 312 (1961); Pereira v. United States, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954); Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). Further, the dismissal with prejudice of all other conspiracy charges leveled against Chases effectively eliminated any danger or risk of successive prosecutions for the same crime.

[3] Chases' due process argument is that, even assuming no double jeopardy violation, government efforts to prosecute

him for related offenses in successive trials is fundamentally unfair and amounts to impermissible "harassment." In this regard we stated in United States v. Ingman, 541 F.2d 1329 (9th Cir. 1976):

> We note that determining whether to indict for a single conspiracy or for separate ones requires the Government to make delicate judgments. When separate trials are sought on the theory that there are multiple conspiracies involving disparate individuals with some interrelationships, charges of bad faith multiplicity or pleas of double jeopardy are likely to be raised on appeal. On the other hand, the Supreme Court, and the lower federal courts, have disapproved the practice of trying different offenses involving a number of defendants at one trial.

Id. at 1331 (citations omitted). We believe that the government could reasonably conclude at the indicting stage of the prosecution that separate and distinct conspiracies existed. The reasonableness of that conclusion vitiates any claim of bad faith multiplicity or harassment. See id. We are reinforced in our holding by Chases' own conduct. He never moved to consolidate the four separate cases against him. Likewise, after his conviction on one conspiracy charge, he failed to move for a dismissal of the remaining conspiracy charges on double jeopardy grounds. It was on the government's motion that the cases were dismissed.

[4] The speedy trial issue (constitutional and statutory) is also groundless. Chases' trial came 100 days after his arraignment. Thus, delay, if any, was negligible. Further, Chases never sought an earlier trial. Finally, he does not even seriously allege, let alone establish, any prejudice caused by the timing of his trial. See Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); 18 U.S.C. §§ 3161 et seq.

AFFIRMED.